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Administrative Enforcement Orders **Frequently Asked Questions** **For** **Unified Program Agencies**

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DEFINITIONS/COMMON USAGE LANGUAGE

Administrative Enforcement Order - For the purpose of these FAQ, the term: “Administrative Enforcement Order” (AEO), includes any of the order variations including the Expedited Consent Order, Draft Unilateral Order, Stipulation and Order, and Unilateral Order.

Show Cause Letter - A letter to the respondent notifying that the UPA is planning to take an AEO action and encouraging the business to contact the UPA to discuss settlement.

Expedited Consent Order - An Expedited Consent Order is issued to the business requesting, in a cover letter, concurrence and signature to finalize the order. This alternative can be used where the violation(s) are not in dispute. It provides quick means of resolution of simple cases, where the respondent is not likely to contest the order.

Draft Unilateral Order - A Draft Unilateral Order with a cover letter states why the draft order is was sent and provides the respondent with a specified number of days to enter into settlement discussions before the actual Unilateral Order is issued. A Draft Unilateral Order is part of a process where an agency informs the business of their intent to take administrative enforcement. As part of showing the business your intent, you provide a “draft” order that demonstrates what you intend to issue to them should they not negotiate to settle the case.

Stipulation & Order - An agreement (a stipulation) with a respondent after a Unilateral Order has been issued. A Stipulation and Order does not require a restatement of the violations identified in the initial Unilateral Order.

Unilateral Order - A complete and signed AEO sent to the respondent without prior discussion or negotiation (Unilateral Orders are not final until the hearing period has passed).

Final Order - An AEO that has been formally issued with consent or without the consent (Unilateral) of the respondent and the time period for the respondent to request an administrative hearing has elapsed.

GETTING STARTED

1. Who should the AEO be issued to?

ANSWER: An AEO should be issued to the “person” who violated the law. “Person” is defined in HSC, section 25118, as “an individual, trust, firm, joint stock company, business concern, partnership, limited liability company (LLC), association and corporation.” As a general rule, the respondent listed on the order will be the legal name of the company or corporation, unless an individual is also being specifically charged. All correspondence regarding an AEO should be addressed to the highest level individual in the organization to ensure it reaches the appropriate party. The legal name of a corporation or LLC can be found at <http://kepler.ss.ca.gov/list.html>.

2. If you are issuing an expedited order and the facility is a corporation, do you issue the order to the agent, process server, or the CEO?

ANSWER: The AEO names whoever violated the law (see above). Service on a corporation may be made by a process server, but that’s not necessary. You can mail it to their agent for service of process but it’s recommended that you also send a copy to the CEO.

Note: For more information on serving an order, see page 31 of the AEO Guidance Document.

3. Do you serve the AEO to the property owner?

ANSWER: If the law or regulation that is being allegedly violated stipulates that it is the responsibility of the “owner or operator” then both parties are in violation of the law (HSC 25280.6). In these instances, both the owner and the operator should be listed as “Respondent” in the enforcement action and served with any and all documents.

4. When is an AEO considered a public document?

ANSWER: Draft orders are public documents once they are sent or served on the respondent. All other orders (Stipulation & Order, Consent Order, and Unilateral Order) become public documents once they are signed by the issuing agency. Remember, you as the issuing agency, do not want to sign a Consent Order or Stipulation & Order until the respondent has signed.

5. Can you accept an attorney’s signature in lieu of the business owner/operator?

Answer: Yes you may, but it’s better practice to get the owner/operator to sign.

“HOW DO I...”

1. What are the authorities of the ALJ? Does anyone have any experience using them?

ANSWER: In accordance with the Administrative Procedures Act (Government Code § 11510 et seq), the ALJ has the authority to decide pre hearing matters such as discovery (exchange of information about the case), conduct the hearing very much like a judge in court and issue a proposed decision for the UPAs consideration. The ALJ acts as an impartial finder of fact to hear the evidence and provide a sound legally based opinion. The proposed decision made by the ALJ is not binding to either party, as the UPA has the discretion to accept, modify or set aside the ALJ’s proposed decision and rehear the matter. (Be aware that modifying or rehearing the matter are very technical matters that require assistance of legal counsel.)

San Luis Obispo and Sacramento Counties have had hearings conducted using ALJs. DTSC and other state agencies have had hearings conducted using ALJs as well.

2. What should a UPA do if the respondent brings an attorney?

ANSWER: It is strongly suggested that the UPA have their attorney (counsel) present when the respondent brings their attorney. Ask the facility if they will be bringing their attorney. This can be done at the time the business calls to set up the appointment for the negotiation or discussion.

3. How should I coordinate with local prosecutorial agencies?

ANSWER: The law requires each CUPA to consult with the DA in their jurisdiction prior to implementing the AEO authority. The purpose is to establish effective coordination methods that meet the needs of both entities and ensures effective and appropriate enforcement throughout each county. Generally, cases should be discussed and provided to local prosecuting agencies for review prior to issuing an AEO. The following information should be provided to the local prosecutor: the violations involved, a brief summary of the case, the proposed penalties, a copy of the draft order, any extenuating circumstances (i.e. history of late/missed permit payments) and compliance history.

Every UPA should be an active member of its local environmental task force. These groups provide a means of communications with local prosecutors and an opportunity to discuss cases. For your local task force, see: <http://www.calepa.gov/Programs/TaskForce/DTSCContact.htm>.

4. What is the burden of proof in an AEO?

ANSWER: The UPA bringing the action has the burden to prove each element of every alleged violation by a “preponderance of the evidence” (more likely than not) including who committed the violation (does the AEO name the correct party), the date the violation was committed (must be within the statute of limitations: see item 5 under miscellaneous), and location (must be within the UPAs jurisdiction).

5. How can I find an agency that has done a similar AEO?

ANSWER: Check with the AEO Technical Advisory Group (TAG). The AEO TAG continues to compile AEO data for others to share.

6. If I have a unique question/issue, where can I go to get answers?

ANSWER: Each UPA is supposed to have sufficient legal counsel. In addition, Cal/EPA and CUPA staff may be contacted and/or the AEO TAG.

7. Where can I find the comprehensive guidance on AEOs?

ANSWER: The Cal/EPA Unified Program website, CUPA Forum Board Website, and in the Annual Unified Program Conference training materials.

8. Should I work through my District Attorney or through my County Counsel (and/or City Attorney in larger jurisdictions)

ANSWER: See number #3 above.

9. How can I best convince management to allow the use of the AEO process?

ANSWER: Be selective about which case you use it for first. Educate your management on the types of cases you think will be a good fit for the process. Keep them involved in the process once a case is initiated, they may find it a good tool. Remind management that enforcement protects law abiding businesses from unfair competition. Any serious opposition to enforcement should be discussed with Cal/EPA CUPA staff.

CHOOSING AN ORDER

1. What is the difference between a Expedited Consent Order and a Stipulation & Order?

ANSWER: The two options were developed by DTSC to enable a little more flexibility in settlement but either can be used to settle an action. The manner in which DTSC uses these is not binding on how they are used by UPAs. As used by DTSC, the Expedited Consent Order is used to document an agreement reached with the “responsible party” BEFORE ever issuing a signed order (like a unilateral order). The Stipulation & Order is used to document an agreement reached with the “responsible party” AFTER a signed order has already been issued. More generically, the Expedited Consent Order is used to note that the parties agree to settle without prior issuance of an order. The Stipulation & Order is used to document settlement or changes to an existing order. This language can be found in paragraph (1) of the orders. However, as long as the language of the order correctly states the facts of how/when agreement was reached, any settlement agreement can have the title “Expedited Consent Order” or “Consent Order” and “Stipulation & Order” or “Stipulated Order.”

2. What do you do if you don’t get a response to a Show Cause Letter?

ANSWER: There are many answers to this question. How to handle each case should be discussed with the UPAs management and legal counsel. The UPA may attempt to contact the business to ensure that the letter was received and that it has reached an appropriate level within the business (i.e. management). All correspondence regarding an AEO should be addressed to the highest level individual in the organization (e.g. Owner, CEO). A second letter may also be sent “return receipt requested” as an attempt to ensure its receipt. Other alternatives are detailed below:

The draft order alternative may be more effective than the Show Cause Letter because it will include a copy of the draft order. This may provide more incentive to the business to respond given that it includes the corrective actions and a penalty amount, although these same factors may make some businesses more defensive and less likely to negotiate.

Another alternative is to issue a Unilateral Order. The conditions laid out in a Unilateral Order may be changed or negotiated, as long as the changes are documented in a Stipulation & Order (remember, this is negotiated and signed after a unilateral order has been signed and issued). Once final, this is a legally binding document that must be complied with. A potential problem with this alternative is that a business may ignore the conditions in the final order. Enforcement of the final order must then be taken to civil court for referral.

Another alternative is to refer the issue to the District or City Attorney to prosecute the case as a civil or criminal matter. Prosecutors should be consulted about the use of the AEO process in general and when specific cases occur.

PROBLEMS/NON-COMPLIANCE

1. What do you do if the respondent does not comply with an order?

ANSWER: If a final order has been issued, either as a one-party signed Unilateral Order or as a two-party signed Expedited Consent Order or Stipulated & Order, the conditions in that final order are legally binding. If the final order is not being complied with, it should be referred to the prosecuting agency for civil or criminal filing.

Final orders may be converted to civil judgments by a court. Generally, conversion of a case from an administrative enforcement order to civil judgment includes filing an “Application for Judgment” with the clerk of the court. You should fill out the application forms and provide them to your attorney to file with the court.

Prior to taking the case to the prosecuting agency, it is often best to make multiple efforts to determine why the conditions of the order are not being met through phone calls or face-to-face meetings, but do not let the situation continue for lengthy periods of time.

2. How do you handle a respondent who simply doesn’t pay?

ANSWER: The conditions of final, signed orders are legally binding. If a respondent refuses to pay, the case may be referred to the prosecuting agency for civil or criminal filing. Be aware that prior to taking the case to the prosecuting agency, it is often best to make multiple efforts to determine why the conditions of the order are not being met through phone calls or face-to-face meetings.

Also, as stated in #1, above, a UPA may apply to the clerk of the appropriate court to convert an AEO (see HSC § 25404.1 et seq) for a judgment to collect an administrative penalty for an AEO or decision that has become final (HSC § 25404.1.3).

Revocation of their operating permit and referral to a prosecutor are options if they continue to operate without a permit.

3. Explain the process of converting an order to a judgment?

ANSWER: The first step in converting an order to a judgment is to obtain an “Application for Judgment” from your attorney or local court. Once the application is filled out, provide the application to your attorney to file with the court. The court will rule on the application and either deny it or issue a Judgment granting you the items asked for in the application. An example of the judgment (with the original order) can be found on DTSC’s website at: http://www.dtsc.ca.gov/HazardousWaste/American_Waste/index.html.

SUPPLEMENTAL ENVIRONMENTAL PROJECTS (SEP)

1. What is a SEP?

ANSWER: Supplemental environmental projects are defined as environmentally beneficial projects that a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform. The three key parts of this definition are elaborated as follows:

- a. “Environmentally beneficial” means a SEP must improve, protect, or reduce risks to public health or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.
- b. “In settlement of an enforcement action” means (1) The enforcing agency has the opportunity to help shape the scope of the project before it is implemented; and (2) the project is not commenced until after the enforcing agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).
- c. “Not otherwise legally required to perform” means the SEP is not required by a federal, state, or local law or regulation. Further, SEPs cannot include actions that the defendant/respondent may be legally required to perform, such as:
 - i. Injunctive relief in the instant case, or in another legal action that an enforcement agency could bring;
 - ii. part of an existing settlement or order in another legal action; or
 - iii. federal, state or local requirements.

SEPs may include activities that the defendant/respondent will become legally obligated to undertake two or more years in the future. Such “accelerated compliance” projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

Performance of a SEP reduces neither the stringency nor timeliness requirements of applicable environmental statutes and regulations. Of course, performance of a SEP does not alter the defendant/respondent’s obligation to remedy a violation expeditiously and return to compliance.

For many of these projects, the defendant/respondent may lack the experience, knowledge or ability to conduct and /or implement the project. In these instances the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project

Examples and detailed descriptions of these categories can be found in the Cal/EPA “Recommended Guidance on Supplemental Environmental Projects” at:
<http://www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf>.

2. When applying SEPs should the penalty be offset by the worth of the SEP?

ANSWER: SEPs are offsets to penalties but as a general rule, the value of the SEP should exceed the dollar value of the penalty waived. SEPs should offer a significant environmental or public health benefit for the amount of penalty waived. SEP guidance published by Cal/EPA suggests that the amount of penalty waived be no more than 25% of the total penalty assessed, not including administrative costs. Even when conditions exist which justify the approval of a SEP,

the penalty policies of the UPA should still require that an adequate monetary penalty be collected. This penalty should be sufficient to provide a deterrent effect as well as to remove any unfair competitive advantage or economic benefit gained by the respondent's noncompliance.

3. How would you suggest we bring up SEPs in the initial meetings?

ANSWER: SEPs and other settlement terms should not be discussed until the UPA and the Respondent agree on the facts and the violations that have been alleged. Then when penalty amounts and settlements are discussed, it may be appropriate to bring up that SEPs may be a part of a settlement. Your agency or the responsible party can propose SEPs. If you believe that the responsible party can, and will, abide by the conditions of any SEPs, it can greatly assist in negotiations if the SEPs have been considered before the initial meeting. As each negotiation is unique, you may find it to your benefit to hear everything the responsible party has to say regarding the violations and proposed penalties before bringing up the SEP concept or offering the respondent the opportunity to identify a SEP in the initial meeting. Respondents that appear willing to readily settle will often be open to discussing SEPs in the initial meeting. Being familiar with SEP guidance and examples such as those in the Cal/EPA SEP guidance can be very valuable at this point.

NOTE: SEPs can be time consuming and difficult to track compliance with. It is strongly recommended you discuss SEPs with an agency that has experience with them. Many agencies have reduced or stopped using SEPs as a result of difficulties and staff time demands. The Regional Water Boards conducted an audit of SEPs and found that many did not provide the benefits and results agreed to.

PENALTIES

1. How do you recommend we evaluate a business ability to pay?

ANSWER: The UPA is required to consider the respondent's ability to pay the assessed penalty (HSC 25404.1.1(b)). Often in the course of discussing settlements, respondents assert that they do not have the financial means to pay the proposed penalty or that paying the penalty will lead to bankruptcy or severe economic hardship. If ability to pay is at issue, the UPA should request from a respondent any financial information the UPA needs to evaluate the claim of financial hardship. A respondent that raises the issue has the burden of providing information to demonstrate financial hardship. It is recommended that the determination of ability to pay be made on the total penalty assessed in the order for all violations rather than separately for the penalty for each program element. It is recommended that any reduction to reflect the violator's inability to pay the entire assessment also be made to the total penalty and distributed proportionally to the penalties calculated for the individual program violations rather than to make this adjustment disproportionately in individual program element penalties.

Training on the ability to pay has been provided at the Annual Unified Program Conference and by the SWRCB and DTSC. US EPA uses financial models to help assist in determining a business's ability to pay. There are three applicable models accessible to CUPAs – ABEL, INDIPAY (Individual Ability to Pay), and BEN. ABEL (not an acronym) is used to assess a company's ability to pay proposed penalties. INDIPAY is used for the same purpose when the respondent is an individual or sole proprietor. BEN (also not an acronym) calculates the economic benefit of non-compliance and is typically reserved for cases where the economic benefit is substantial. These models can be found on the US EPA web site www.epa.gov/. However, the models are not definitive and often do not consider all the variables in a respondent's financial situation.

2. What is a “forensic accountant” and how can I find one?

ANSWER: A forensic accountant is to accounting what a forensic medical expert is to a medical doctor. The forensic accountant goes beyond the numbers, or behind the numbers, to decipher and explain for others, and sometimes for a court proceeding, what a transaction or series of transactions may mean in lay person's terms. The forensic accountant may also be a CPA and also a CFE (Certified Fraud Examiner), is an expert in the “science” of accounting, and also the forensic skills required for developing and presenting evidence suitable for a legal proceeding.

These professional services are expensive. If a case is this complicated it may not be appropriate for administrative enforcement.

How to find one? Professional listings can be found in the yellow page listings and listings on the web. Other sources for review of financial records include your County Family Support Office or the DA's Consumer Fraud Unit, who may have resources in this area.

3. Where should penalties go?

ANSWER: By law, all penalties collected from Administrative Enforcement actions must be deposited in a special account that is used to fund the activities of the UPA to enforce the law. It is strongly suggested that each CUPA have a separate, distinct account set aside for the holding of

monies collected from administrative enforcement. The monies may be used in any way, including use to fund personnel hiring, training (registration/travel reimbursement), a “future ALJ use fund”, and/or equipment purchase. Monies may also be donated to the Environmental Enforcement and Training Grant Program as authorized by Penal Code sections 14300 et seq. and Title 27, Division 1, Chapter 2, of the California Code of Regulations. This grant program provides a non-general fund source of financial assistance for education and training programs to enhance statewide enforcement of environmental laws. We can anticipate that these monies will be periodically audited.

4. What options can courts provide when someone fails to comply/pay?

ANSWER: If the AEO is not paid, then the order may be converted to a judgment and court ordered collection methods may be used. More detail is not possible in a FAQ. The easiest is to take the judgment to your city/county collector or to a private collection agency (they will take a third of the recovered money).

If the failure includes ongoing non-compliance, a court can order the facility to cease to operate. Failure to obey court orders is contempt of court and criminal penalties may apply.

ADMINISTRATIVE LAW JUDGE ISSUES

1. When do I have to contact the Administrative Law Judge?

ANSWER: Within 90 days of receipt of the Notice of Defense (NOD) by the UPA, the hearing shall be scheduled (HSC §25404.1.1(e)). Respondents routinely file the Notice of Defense to reserve their rights, but a settlement can still be reached after the Notice has been filed. The process for contacting an ALJ can be found on the Cal/EPA Website at: <http://calepa.ca.gov/CUPA/Publications/> under Guidance for Administrative Enforcement Order (AEO) and Hearing Procedures.

2. Who is responsible to pay for the Administrative Law Judge?

ANSWER: The responsibility to pay for the ALJ is with the UPA bringing the action. However, there is a contract at this time (fiscal year 04-05), between Cal/EPA and OAH that will cover the costs of a hearing on an order issued by an UPA. Although a contract is in place through June 30, 2005, and Cal/EPA will consider extending it for another year, the current fiscal difficulties make the extension uncertain. Each agency should plan for these costs after that date.

3. Can I add ALJ costs to the AEO cost recovery total?

ANSWER: No. Every respondent is entitled the right to due process of law and therefore do not have to pay for it. If the matter ultimately settles, a Respondent could but does not have to agree for paying for costs, including the ALJ. All penalty monies from an AEO are retained by the UPA and these funds could be used to pay for or to reimburse the account that paid for the ALJ.

4. Can I use a different hearing officer than the Administrative Law Judge?

ANSWER: The option to use a different hearing officer lies with the respondent only if the UPA has designated a local hearing officer. The respondent can then choose between an ALJ from the Office of Administrative Hearings or a local hearing officer designated by the UPA. If the UPA does have a local hearing officer, they must conduct the hearing in accordance with the Administrative Procedures Act.

MISCELLANEOUS

- 1. What violations of 6.95 would be appropriate for the AEO process? Are there any that would be inappropriate?**

ANSWER: The AEO can be used for any violation of Article 1 (business plans) per HSC §25514.5 or Article 2 (RMP) per HSC § 25540 that is not a minor violation as defined in section 25404.1.2. What enforcement response is appropriate should be addressed in the UPAs enforcement plan and by coordination with prosecutors such as the local City or District Attorney.

- 2. What were the specific issues that had to be worked out in AB 1640 (2003 CUPA Bill) that related to the AEO process, and will those changes affect the current AEO process? How?**

ANSWER: AB1640 (2003) removed AEO authority for violation of corrective action orders in the UST program. This had been inadvertently added in the previous legislation.

The bill provides the following new AEO tools:

- a. A UPA may suspend or revoke any unified program facility permit or element of such permit for not paying the permit fee or a fine or penalty associated with the permit.
- b. A UPA may apply to the clerk of the appropriate court to convert an AEO (see HSC § 25404.1et seq) for a judgment to collect an administrative penalty for an AEO or decision that has become final (HSC § 25404.1.3).
- c. Existing law requires businesses that handle hazardous materials to prepare a business plan and submit an annual inventory form to the AA. The term “business” is defined as including the federal government, as specified, or any agency, department, office, board, commission or bureau of state government, including, but not limited to, the campuses of the California Community Colleges, the California State University, and the University of California. This bill includes in the definition of business, any agency, department, office, board, commission, or bureau of a city, county or district.
- d. Existing law provides for the imposition of civil and criminal penalties upon stationary sources with regard to the program to prevent accidental releases of regulated substances. However, the provision only applied to “stationary sources” not persons. This bill includes a new definition of the term “person” for purposes of the provisions regulating accidental releases and would authorize the imposition of civil and criminal liability upon a person who violates those provisions. Knowing violations are first time misdemeanors, second time wobblers.

- 3. What are some good publicity techniques for AEOs?**

ANSWER: A press release to local news organizations, publications in trade journals or industry group newsletters, posting on agency websites, and presentations at industry group meetings are all good outreach techniques. In any area where the business will be asked to self disclose that their SEP action is as a result of a settlement, please make sure that you agree on the “admissions” language in the order, and include any specific publicity language in the settlement document. All final AEOs should be publicized through press releases.

4. Is enforcement with an AEO considered double jeopardy if they are in violation of both Federal and State Regulations? (For example, Article 2 of 6.95). Can the Feds still take action? If the Feds identify them first, can the locals still take action?

ANSWER: Since the State is a separate sovereign entity, state agencies, and by extension, the CUPAs may take enforcement action in addition to the federal government. It is strongly suggested that major cases be brought to the attention of the Federal Government.

5. What is the statute of limitation for Administrative Enforcement? Criminal? Civil?

ANSWER: The statute of limitations for administrative enforcement is 5 years as set in Health and Safety Code. The statute of limitations for civil enforcement is five years as set in Civil Code. The statute of limitations for criminal enforcement is either one or three years, depending on if the violation is charged as a misdemeanor (1 year) or a felony (3 years). Please note that the statute of limitations begins from the time of discovery of the violation, not the time of action of the violation.

Note: CCP § 340. One year is the general rule for civil penalties. Use this statute of limitations for HSC Chapter 6.95 (HMMP and Cal/ARP)

6. Is a local ordinance necessary for AEOs?

ANSWER: No. The statutes were drafted so that no local ordinances would be needed. In fact, the creation of local implementing statutes would go against the express purpose of the AEO statutes which is to improve consistency both between programs and statewide. If any body tells you, you need a local ordinance, please let the Cal EPA Unified Program Section staff know.

7. How do you determine continuous or ongoing violations:

ANSWER: This depends on the facts of the case and the section in question. Some violations are continuous. I.E. each and every day waste is stored over 90 days is a separate violation. However, remember you need evidence for each and every day.